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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CATHY A. CATTERSON
U.S. COURT OF APPEALS

HERMILO HERNANDEZ-HERNANDEZ,

Petitioner - Appellant,

v.

JEAN HILL,

Respondent - Appellee.

No. 03-35304

D.C. No. CV-01-01194-AA

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Ann L. Aiken, District Judge, Presiding

Argued and Submitted November 6, 2003
Portland, Oregon

Before: ALARCON, RAWLINSON, and BYBEE, Circuit Judges.

The prosecution's final question to its expert witness did not inquire about the typicality of recantations as permitted by state law. *See State v. Middleton*, 294 Or. 427, 438 (1983). Instead, by alleging that the recantation surfaced because the

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

appellant was “at large,” the prosecution impermissibly vouched for the victim’s subsequent disavowal of her recantation. *See id.* Defense counsel’s failure to object to this question fell below an objective standard of reasonableness. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

However, the evidence supporting the guilty verdict was such that confidence in the outcome is not undermined. *See Griffey v. Lindsey*, 345 F.3d 1058, 1070 (9th Cir. 2003). Both the appellant and the victim were infected with the same sexually transmitted disease, the victim’s recantation did not address the fact that she had been penetrated prior to her tenth birthday, and testimony indicated that the victim’s mother was aware of the abuse. Because the appellant is unable to show a reasonable probability of prevailing had an objection been made, he is not entitled to habeas relief. *See Strickland*, 466 U.S. at 694.

AFFIRMED.